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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
2/4/2020
DEANA WILLIAMSON, CLERK

DEWEY DEWAYNE BARRETT,
Appellant
v.
THE STATE OF TEXAS,
Appellee

On Appeal from the Twelfth Court of Appeals
and the Seventh District Court of Smith County, Texas
Cause Nos. 12-18-00023-CR & 007-1252-17

STATE'S BRIEF

ORAL ARGUMENT REQUESTED

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

DEWEY DEWAYNE BARRETT,
Appellant
v.
THE STATE OF TEXAS,
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On Appeal from the Twelfth Court of Appeals
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Cause Nos. 12-18-00023-CR & 007-1252-17

STATE'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the undersigned Assistant Criminal District Attorney, respectfully requesting that this Court affirm the judgment of the Twelfth Court of Appeals in the above-captioned cause.

STATEMENT OF FACTS

At appellant's trial for felony family violence assault by strangulation (hereinafter "assault by occlusion"), an eyewitness and the victim's cousin, Mr. Bright, described the first assaultive incident constituting the charged offense. Mr. Bright testified that appellant began choking Ms. Mackey outside of her car during an argument, and that she began "wheezing and gasping for

breath." (VIII Rep.'s R. at 145). Mr. Bright moved between them and pushed appellant away, but their argument continued, and appellant again strangled the victim with one hand around her neck while she gasped for air (*Id*. at 146-47). After Mr. Bright physically intervened a second time, grabbing appellant and explaining to him that the victim just wanted to get back home, the fight appeared to be over (*Id*. at 147). Appellant jumped in the driver's seat of the victim's car, and she joined him in the passenger seat (*Id*.). The vehicle had traveled down the street away from Mr. Bright, when he heard "a bunch of noise" from inside and the victim "screaming and hollering." (*Id*. at 148). Ms. Mackey soon emerged from the vehicle, her face bloodied (*Id*. at 149-50). Ms. Mackey testified that appellant had punched her in the face several times when she tried to kick the steering wheel and gear shift (*Id*. at 77), but she denied the strangling incident outside her car (*Id*. at 93). At the scene, Ms. Mackey told the police and paramedic that appellant had indeed choked her (*Id*. at 54, 56, 81-82, 86, 98, 114-15). The trial court denied appellant's request for a lesser-included offense instruction on misdemeanor bodily injury assault by striking the victim in the face (*Id*. at 198, 203), and the Twelfth Court affirmed appellant's conviction, holding that he was not entitled to the requested instruction because bodily injury assault was not a lesser-included offense of assault by occlusion as alleged in the indictment. *Barrett v. State*, No. 12-18-00023-CR, 2018 Tex. App. LEXIS 8250, at *5-6 (Tex. App.–Tyler Oct. 10, 2018, pet. granted) (mem. op., not designated for publication).

Summary of Argument

Although the Twelfth Court reached the correct result, that appellant was not entitled to a lesser-included offense instruction on bodily injury assault, its determination that the conduct underlying the requested instruction was not included in the proof necessary to establish the charged offense of assault by occlusion was erroneously made during the first step of the *Hall* analysis rather than the second. While multiple physical injuries inflicted in a single attack would probably not be separately actionable, the evidence at trial showed two discrete assaults occurring in two separate incidents. Lastly, to the extent *Irving* did not exclusively rely on the cognate pleadings approach to determine whether bodily injury assault was a lesser-included offense of aggravated assault as alleged in the indictment, it is in conflict with *Hall* and its progeny. Whether the conduct establishing the lesser offense is included within the conduct charged, or within the facts required to prove the charged offense, is properly addressed in the second step of the *Hall* analysis.

I. Ground for Review One: Did the court of appeals err in holding that misdemeanor assault by striking in the face was not a lesser-included offense of family violence assault by impeding breath or circulation?

Argument and Authorities

Appellant's requested lesser offense was, as a statutory matter, included within the indictment for assault by occlusion, and the Twelfth Court probably erred in considering a separate assault shown by the evidence at trial in the first step of the lesser-included offense

analysis.[1] *See Barrett*, 2018 Tex. App. LEXIS 8250, at *5-6. The Twelfth Court's analysis would have been properly conducted during the second step, and as appellant's requested instruction was based on conduct not included in the proof necessary to establish the offense charged, the Twelfth Court correctly held that appellant was not entitled to the requested instruction. *See Wortham v. State*, 412 S.W.3d 552, 557 (Tex. Crim. App. 2013) ("Such an analysis is best addressed when determining whether the evidence presented at trial is sufficient to support the lesser-included offense at all."). "An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Tex. Code Crim. Proc. Ann. art. 37.09(1) (West 2019). In *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007), this Court set forth the two-part analysis used to determine whether a defendant is entitled to a lesser-included offense instruction and adopted the cognate pleadings approach as the "sole test" to be used in the first step of the analysis. This first step, "determining whether an offense is a lesser-included offense of the alleged offense, is a question of law":

> It does not depend on the evidence to be produced at the trial. It may be, and to provide notice to the defendant must be, capable of being performed before trial by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense.

Id. The indictment against appellant for assault by occlusion contained the following elements:

[1]As did this writer (State's Br. 6-8, No. 12-18-00023-CR, Aug. 6, 2018).

(1) Appellant
(2) intentionally, knowingly, or recklessly
(3) caused bodily injury to the victim
(4) who was a person described in certain sections of the Family Code; and
(5) the offense was committed by "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck."

(Clerk's R. at 1); Tex. Penal Code Ann. § 22.01(b)(2)(B) (West 2019). *See Price v. State*, 457 S.W.3d 437, 442 (Tex. Crim. App. 2015) (listing the three parts of the offense of assault by occlusion). These elements of the offense as modified by the indictment are then compared to the elements of misdemeanor assault causing bodily injury as follows:

(1) a person commits an offense if he:
(2) intentionally, knowingly, or recklessly;
(3) causes bodily injury to another, including the person's spouse.

Tex. Penal Code Ann. § 22.01(a)(1) (West 2019). Because the indictment alleges all of the statutory elements of the requested lesser-included offense, bodily injury assault is a lesser-included offense of assault by occlusion. *See Fraser v. State*, 583 S.W.3d 564, 568 (Tex. Crim. App. 2019) ("[L]esser offenses are examined only for their statutory elements."); *Marshall v. State*, 479 S.W.3d 840, 844 (Tex. Crim. App. 2016) ("[A]ny impediment to normal breathing is a bodily injury."). Citing *Irving v. State*, 176 S.W.3d 842, 846 (Tex. Crim. App. 2005), the Twelfth Court held otherwise, reasoning as follows:

> In his brief, Appellant argues that he was entitled to a lesser included offense instruction because his wife's injuries could have been caused in ways other than by impeding her breath or circulation. More particularly, he contends that the jury could have believed that Appellant hit his wife in the face, but did not choke her. Appellant contends that hitting

> Mackey in the face is a lesser included offense. However, assault by striking Mackey in the face is not established by proof of the same or less than all of the facts required to establish assault by "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." A trial court is not required to instruct a jury on a lesser included offense where the conduct establishing the lesser offense is not "included" within the conduct charged.

Barrett, 2018 Tex. App. LEXIS 8250, at *5-6. Trial evidence, showing here a separate assault from the one charged in the indictment, remains an important part of the trial court's decision to charge the jury on a requested lesser-included offense, but only in the second step:

> The second step in the analysis should ask whether there is evidence that supports giving the instruction to the jury. A defendant is entitled to an instruction on a lesser-included offense where the proof for the offense charged includes the proof necessary to establish the lesser-included offense and there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. In this step of the analysis, anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge. In other words, the evidence must establish the lesser-included offense as a valid, rational alternative to the charged offense.

Hall, 225 S.W.3d at 536 (footnotes, internal quotation marks omitted). Since *Irving*, this Court has decided that the issue of "whether the conduct underlying the requested lesser-included instruction is included in the proof necessary to establish the offense charged," is properly analyzed in the second step of *Hall*'s lesser-included offense analysis. *Wortham*, 412 S.W.3d at 557 ("Such an analysis is best addressed when determining whether the evidence presented at trial is sufficient to support the lesser-included offense at all.").

Although conducted during the wrong step, the Twelfth Court's analysis of the issue and its conclusion that appellant was not entitled to the requested lesser-included offense

instruction were correct: the conduct underlying the requested lesser offense of bodily injury assault by striking the victim with his hands and its result, injuries to the victim's face, were different from the charged conduct of strangulation and the resulting specific statutory injury alleged, that the victim's normal breathing or circulation was impeded. *See Price*, 457 S.W.3d at 443 (assault by occlusion is a result-of-conduct offense, and required injury is that "normal breathing or circulation of the blood has been impeded"); *Cf. Wortham*, 412 S.W.3d at 557 (requested instruction erroneously denied because conduct underlying lesser-included instruction and charged offense, shaking, as well as the result, the child's injuries, were the same). Appellant engaged in two different courses of conduct, striking with hands and strangling, resulting in two separate bodily injuries, and "[h]owever bodily injury is defined, a separate bodily injury would be a separate offense." *Johnson v. State*, 364 S.W.3d 292, 298 n.45 (Tex. Crim. App. 2012). The second instance of assaultive conduct, when appellant punched the victim in the face inside the car as they drove away from the scene of the earlier assault by occlusion, constituted a separate offense occurring during a separate incident from that charged in the indictment.[2] Even though the evidence showed this discrete extraneous offense, a separate bodily injury assault resulting in a different injury from the one specifically alleged in the indictment, "the defendant cannot foist upon the State a crime the State did not intend to prosecute in order to gain an instruction on a defensive issue or a lesser included offense."

[2]That the two discrete assaults were committed during two separate incidents will be discussed further in response to the second ground for relief below.

Bufkin v. State, 207 S.W.3d 779, 781 (Tex. Crim. App. 2006). As neither the conduct underlying the requested lesser-included instruction nor the result of that conduct were included in the proof necessary to establish the offense charged, the Twelfth Court correctly held that appellant was not entitled to the requested lesser-included offense instruction. *See Wortham*, 412 S.W.3d at 557.

II. GROUND FOR REVIEW TWO: Do multiple physical injuries inflicted in a single attack constitute separately actionable crimes of assault or are they part of a single assault?

ARGUMENT AND AUTHORITIES

While multiple physical injuries inflicted in a single assaultive event or attack probably do not constitute separately actionable crimes of assault, the facts of this case show two discrete assaultive incidents separated by the successful intervention of Mr. Bright. As the Court noted in *Johnson*, "[s]eparate crimes of aggravated assault could be based upon separately inflicted instances of bodily injury", and "a separate bodily injury would be a separate offense." *Johnson*, 364 S.W.3d at 298 n.45. A defendant may be convicted of multiple offenses occurring as points along a continuum in a single criminal transaction under certain circumstances, but not "when those offenses share the same underlying gravamen." *Garfias v. State*, 424 S.W.3d 54, 63 (Tex. Crim. App. 2014). Bodily injury assault and assault by occlusion share the same

gravamen, causing bodily injury.[3] *Price*, 457 S.W.3d at 442-43 (citing *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008)). Therefore, multiple physical injuries inflicted in a single attack would probably not constitute separately actionable assaults.

However, where the evidence shows two discrete assaultive episodes or incidents, separated here by the physical intervention of a third party, and a different injury resulting from each attack, two separately actionable crimes of assault have been committed. *See Cooper v. State*, 430 S.W.3d 426, 438 (Tex. Crim. App. 2014) (Cochran, J., concurring) (Two actionable assaults occurred if Dangerous Dan "threatened Suzie [Q] with a bat in the bedroom and, when she shrieked, he put the bat down, but after she walked out of the room, he picked up the bat, followed her, and banged her with the bat in the kitchen," because they were separate incidents.). The facts of this case are similar to those in *Hernandez v. State*, 556 S.W.3d 308, 311, 315 (Tex. Crim. App. 2017), but show an even clearer separation between the two assaultive episodes. In *Hernandez*, the defendant struck the victim's head and face with his hands in the bedroom, then left the room to retrieve water before returning to force it down her throat while strangling her with one hand. *Id*. The Court left open the possibility that two discrete actionable assaults were shown by the evidence, finding that no material variance

[3]The allowable unit of prosecution for assaultive offenses is each victim, or one unit per "one instance of assaultive conduct against a single person." *Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App. 2014). If the charged offense is a result-of-conduct offense such as bodily injury assault, different units of prosecution can occur if the *result* is different. *See Wortham*, 412 S.W.3d at 560 (Keller, P.J., concurring).

existed between allegation and proof because the indictment did not specify the precise injury inflicted. *Id*. at 316.

Here, Mr. Bright testified that he believed the fight, during which appellant strangled the victim twice outside the car, was over after he grabbed appellant away from her and explained that the victim was only trying to return home (VIII Rep.'s R. at 146-47). Appellant did not move to attack the victim again but jumped in her car and began driving down the street, after Ms. Mackey had joined him in the passenger seat, before the assault by striking her in the face began (*Id*. at 147-49). The "one wrong impulse of will" from which the first assault by occlusion proceeded was thus at an end before the second assault commenced later inside the vehicle, and the two events were therefore separate incidents constituting separately actionable assaults. *See Crocker v. State*, 573 S.W.2d 190, 198 (Tex. Crim. App. 1978) (quoting *Whitford v. State*, 24 Tex. Civ. App. 489, 492, 6 S.W. 537, 538 (1887)) (defining criminal transaction).

III. GROUND FOR RELIEF THREE: Should *Irving v. State*, 176 S.W.3d 842 (Tex. Crim. App. 2005), be overruled in light of other developments in our caselaw?

ARGUMENT & AUTHORITIES

The lesser-included offense analysis in *Irving* does conflict with this Court's clarification of the law of lesser-included offense instructions established in *Hall* and its progeny. *Compare Hall*, 225 S.W.3d at 535-36, *with Irving*, 176 S.W.3d at 845-46. In *Irving*, the Court determined that bodily injury assault was not a lesser-included offense of aggravated assault, the first step in the

Hall analysis, not through the use of the cognate pleadings approach but because the conduct underlying the requested lesser-included instruction, grabbing and falling on top of the victim, was not included in the proof necessary to establish the offense charged, striking the victim with a baseball bat. *Irving*, 176 S.W.3d at 846. The Court explained that:

> Because the conduct constituting the offense of assault for which the Appellant wanted an instruction is not the same as the conduct charged in the indictment for aggravated assault, assault by means of grabbing the victim and eventually falling on top of her is not a lesser-included offense of aggravated assault by striking the victim with a bat. This offense fails to meet the requirements of Texas Code of Criminal Procedure Art. 37.09 because the same facts or less than the same facts required to prove the greater aggravated assault offense are not required to prove the assault offense. Proof that Appellant grabbed and fell on top of the victim is not required to prove aggravated assault by hitting the victim with a bat. Assault by grabbing and falling on someone may be a lesser-included offense of aggravated assault in some instances, but not as the greater offense was charged in the indictment in this case.

Id. (footnotes omitted). The issue of whether the conduct underlying the lesser-included instruction is included in the proof necessary to establish the charged offense, which will depend on the evidence presented at trial, should be analyzed during *Hall*'s second step. *Wortham*, 412 S.W.3d at 557. To the extent the analysis in *Irving* did not rely on the cognate pleadings approach as the "sole test" for "determining whether an offense is a lesser-included offense of the alleged offense," it should be overruled. *See Hall*, 225 S.W.3d at 535. Nevertheless, the result the *Irving* Court reached, that "a trial court is not required to instruct a jury on a lesser included offense where the conduct establishing the lesser offense is not 'included' within the conduct charged; i.e. within the facts required to prove the charged

offense," would still be correct as long as the issue is analyzed during *Hall*'s second step. *Irving*, 176 S.W.3d at 846. *See Wortham*, 412 S.W.3d at 557.

Prayer

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Court affirm the judgment of the Twelfth Court of Appeals in the above-captioned cause.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned attorney certifies that the word count for this document is 3,056 words as calculated by Corel WordPerfect X6.

/s/ Aaron S. Rediker
AARON S. REDIKER

Certificate of Service

The undersigned hereby certifies that, on this 3rd day of February 2020, the State's Brief in the above-numbered cause has been electronically filed and a legible copy has been sent by email to Austin Reeve Jackson, attorney for appellant, at JLawAppeals@gmail.com and Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov.

/s/ Aaron S. Rediker
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